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NO. 09-136

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERTA L. MARTIN,
PETITIONER,

v.

CITY OF SAN ANTONIO, NORMA WOODS, BADGE # 0899, L.CARRION, BADGE # 0170, J. WILLINGHAM, BADGE # 0688, E. RODRIGUEZ, BADGE # 1567,
RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD L. PIÑA
Counsel of Record
EDWARD L. PIÑA
& ASSOCIATES, P.C.
THE ARIEL HOUSE
8118 DATAPOINT DRIVE
SAN ANTONIO, TEXAS 78229
(210) 614-6400 TELEPHONE
(210) 614-6403 FACSIMILE

PATRICK J. FILYK
TERESA K. VALENTIC
CO-COUNSEL

QUESTIONS PRESENTED FOR REVIEW

(1) This case questions the use of 28 U.S.C. §1915(d) to deny indigent litigants the right to appeal matters of public concern (i.e. roadside body cavity searches of arrestees) by refusing to certify that an *in forma pauperis* appeal is brought in good faith.

(2) Whether a transcript at government expense can be denied based upon a court's determination that an appeal involves no legal points arguable on their merits and is therefore frivolous when the record shows numerous substantive issues that could only be addressed on appeal, including whether the trial court erred in

- **(a)** granting partial summary judgment in favor of some of the defendants;
- **(b)** denying a Batson Challenge when Black and Hispanic potential jurors were struck by the defense based upon their race, color or national origin;
- **(c)** some of the defendant police officers offered perjured testimony at trial; and
- **(d)** failing to admit into evidence prior acts of similar misconduct by some of the defendant police officers.

CERTIFICATE OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Court may evaluate possible disqualification or recusal.

PETITIONERS

Roberta L. Martin	Petitioner
Edward L. Piña	Counsel of Record in the Supreme Court
Patrick J. Filyk	Co-Counsel
Teresa K. Valentic	Co-Counsel

RESPONDENTS

The City of San Antonio	Respondent
Norma Woods, Badge #0899	Respondent
L. Carrion, Badge # 0170	Respondent
J. Willingham, Badge # 0688	Respondent
E. Rodriguez, Badge # 1567	Respondent
Nathan Mark Ralls	Counsel for Respondent Officers
Gail A. Jensen	Counsel for City Of San Antonio

/S/ Edward L. Piña
Edward L. Piña

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A. Question Number 1

This case questions the use of 28 U.S.C. §1915(d) to deny indigent litigants the right to appeal matters of public concern (i.e. roadside body cavity searches of arrestees) by refusing to certify that an *in forma pauperis* appeal is brought in good faith. 7

B. Question Number 2

Whether a transcript at government expense can be denied based upon a court's determination that an appeal involves no legal points arguable on their merits and is therefore frivolous when the record shows numerous substantive issues of public concern that could only be addressed on appeal including:

(a) granting partial summary judgment in favor of some of the defendants;

(b) denying a Batson Challenge when Black and Hispanic potential jurors were struck by the defense based upon their race, color or national origin;

(c) some of the defendant police officers offered perjured testimony at trial; and

(d) failing to admit into evidence prior acts of similar misconduct by some of the defendant police officers.

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JURISDICTION

(1) This action was filed *pro se* in the United States District Court for the Western District of Texas, complaining about the violation of plaintiff's constitutional rights as a result of a roadside body cavity search by police on January 15, 2003. The trial court had jurisdiction pursuant to 28 U.S.C. §1331 and plaintiff's claims are cognizable pursuant to 42 U.S.C. §1983 for Fourth and Fourteenth Amendment violations of the Constitution of the United States.

(2) Appellate jurisdiction below was timely asserted *pro se* pursuant to 28 U. S. C. §1291 because the order and judgment appealed from was the final decision of a United States District Court entered on May 31, 2007. Appellant moved for *in forma pauperis* (IFP) status on appeal and for transcripts at government expense. The trial court refused to certify that the appeal was taken in good faith or that the plaintiff appellant raised issues with arguable merit in accordance with 28 U.S.C. §1915(d). Plaintiff thereupon filed a *pro se* motion for IFP status in the United States Court of Appeals for the Fifth Circuit, which the court construed as a challenge to the district court's certification decision. The Court of Appeals dismissed petitioner's appeal on March 3, 2009. Accordingly, this Petition for Writ of Certiorari is in all respects timely and cognizable.

(3) The Supreme Court has jurisdiction because the decision of the United States Court of Appeals for the Fifth Circuit is in conflict with prior decisions of this Court and of other Circuit Courts. The jurisdiction of this Court is conferred by 28 U.S.C. §1254 (1) and Rule 10.1(a), 28 U.S.C. Rules of the Supreme Court.

(4) Petitioners do not expect a cross petition for writ of certiorari to be filed pursuant to Rule 12.3.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

United States Constitution Amendment IV

United States Constitution Amendment XIV

United States Code, Chapter 42, Section 1983

United States Code, Chapter 28, Section 1915(d)

STATEMENT OF THE FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

A. Nature of the Case and Disposition Below

Plaintiff Roberta Martin filed this suit *pro se* complaining about the violation of her constitutional rights during a traffic stop and arrest on the night of January 15, 2003. The trial court approved her application to proceed *in forma pauperis* and appointed an attorney to represent her. The record below shows that Plaintiff drove to visit a friend at someone's home and on her way she saw flashing police lights and pulled over. Officer Rodriguez approached the driver's side window and asked plaintiff for her identification. Ms. Roberts did not have her driver's license, but gave officer Rodriguez a medical identification card and her proof of insurance. When plaintiff Roberts asked why she had been stopped, Officer Rodriguez stated that she was not wearing her seatbelt. Plaintiff protested that she was in fact wearing her seat belt. A second officer, Officer Carrion, approached her car from the passenger-side window.

Roberta Martin, a female of African descent was then instructed to exit the vehicle whereupon the officers moved her to an area at the rear of the vehicle. Plaintiff alleges that Officer Carrion then began searching her car, and that the officers found a crack

pipe and a small amount of cocaine on the ground by the driver's side door.

Ms. Martin was handcuffed with her hands behind her back and the officers ran a criminal background check. After learning of her criminal record for drug possession and prostitution, the officers began calling her derogatory names such as a crackhead and a nigger, and also told her that someone was coming to search her "pussy". Plaintiff was placed in the back of a patrol car. The officers repeatedly stated "Get Butch" which was apparently a request for assistance by a specific female police officer. A canine unit arrived, and a canine search of Plaintiff's vehicle revealed no drugs or evidence of criminal activity.

Eventually, Officer Norma Woods arrived. Ms. Roberts testified that Woods told Plaintiff to exit the vehicle or she would be forcibly removed. Woods put on a pair of blue gloves and moved plaintiff to an area near the back of the police car on the side of the road. Roberta Martin testified that Woods started checking her outer clothing, then pulled her pants down. Plaintiff testified that Woods then penetrated her vagina with her fingers for three to five minutes, and that when Plaintiff tried to turn around to see Wood's badge, Wood's told her to turn around and "shut the fuck up, bitch". Woods then attempted to insert her finger in Plaintiff's anus, but Plaintiff went ballistic.

Plaintiff testified that she protested that that was virgin territory, to which officer Willingham responded that she should be used to being fucked back there and that her asshole should be as wide open as the outdoors. Woods completed the search without penetrating plaintiff's anus, and then placed Plaintiff back in the police car. Officers Rodriguez and Carrion took Plaintiff to the jail, and Plaintiff was booked for possession of cocaine. Plaintiff asserts that she began seeing psychiatrist in November 2003 due to her emotional injuries from the event.

B. Statement of Facts Relevant to Issues Presented for Review

Plaintiff sued the City of San Antonio and Officers Rodriguez, Willingham, Woods, and Carrion for a violation of her Fourth Amendment rights based on the strip and body cavity search conducted in the field. A second cause of action was brought against the City pursuant to §1983 for a violation of Plaintiff's Fourth Amendment rights based on the field strip and body cavity search. The Complaint alleges that, although the City has a facially neutral policy and custom regarding strip searches, the officers acted with deliberate indifference to Plaintiff's Fourth Amendment rights. The second cause of action further alleged that the City has an established custom and unwritten policy of conducting strip and body cavity searches of certain female arrestees in the field, and

that this established custom and unwritten policy was the moving force behind the violation of Plaintiff's constitutional rights.

The third cause of action alleged a §1983 claim against the City for a violation of Plaintiff's Fourteenth Amendment rights based on harassing and abusive verbal and physical conduct toward her during the arrest. The fourth cause of action alleged a §1983 claim against the individual officers for a violation of Plaintiff's Fourteenth Amendment Rights based on their verbal and physical harassment of her as well.

REASONS FOR GRANTING WRIT AND CONCLUSION

Petitioner filed suit *pro se*, was granted *in forma pauperis* status and appointed counsel to represent her. The evidence adduced at the trial showed that although the officers were following a long standing practice, they were violating San Antonio Police Department policy by conducting the road side body cavity search[1]. The jury returned a verdict in favor of the City and the officers and the trial court entered a judgment for the defense. Plaintiff then initiated a timely *pro se* appeal. The district court refused to certify her appeal which was necessary in order to continue her appeal *in forma pauperis* (IFP).

Under 28 U.S.C. §1915(d), a federal court may refuse to certify an appeal for *in forma pauperis status*. The United States Court of Appeals construed Petitioner's IFP motion as a challenge to the district court's certification decision.

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[1] Petitioner requests that the Court take judicial notice pursuant to Fed. R. Evid. 201 that the City of San Antonio subsequently amended and clarified its policy on searches, strip searches and body cavity searches.

An appellate court's inquiry into whether an appeal is taken in good faith is limited to whether the appeal involves legal points arguable on their merits and are therefore not frivolous. In this case, Petitioner Martin argued that (1) the City of San Antonio was not entitled to summary judgment on some of their claims; (2) the district court erred in overruling her challenges during voir dire to the City's striking of Black and Hispanic veniremen from the jury pool pursuant to *Batson v. Kentucky*; (3) that the defendant officers perjured themselves during the trial; and (4) the defendants' Internal Affairs' files should have been admitted as evidence. These were ***not*** frivolous points. They were substantive and important issues that could have been and should have been argued on the merits on appeal.

This certification process is deeply flawed. It requires a single standard of review for cases regardless of whether they were dismissed upon filing pursuant to Rule 12b(6) for failure to state a claim, or upon motions for summary judgment pursuant to Rule 56, F.R.Civ.P, or as here, after the appointment of counsel and a jury trial on the merits. The application of single standard for determining whether an indigent litigant may proceed IFP regardless of the state of the evidence in the case results in the denial of due process for litigants who have developed extensive, probative evidence at trial but cannot appeal an unfavorable decision. There is simply no credible way

that a trial judge or a court of appeals can conclude that a police department's tolerance for roadside body cavity searches has no arguable merit without torturing the concepts of a frivolousness, or a good faith and or arguable merit.

WHEREFORE, premises considered, petitioner, Roberta L. Martin prays that the Court thoroughly consider this Petition for Writ of Certiorari, as well as the status of the legal precedents, then grant the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and order briefing of the issues and argument of this case. Attorney fees and costs are also requested.

Respectfully Submitted,

EDWARD L. PIÑA
Texas State Bar Number 16011352

PATRICK J. FILYK
Texas State Bar Number 00790680

TERESA K. VALENTIC
Texas State Bar Number 24008195

EDWARD L. PIÑA & ASSOCIATES, P.C.
The Ariel House
8118 Datapoint Drive
San Antonio, Texas 78229-3268
(210) 614-6400 Telephone
(210) 614-6401 Telecopier
epina@arielhouse.com
ATTORNEYS FOR PETITIONERS

UNITED STATES DISTRICT COURT
W.D. TEXAS.
SAN ANTONIO DIVISION

ROBERTA L. MARTIN,	§	
Plaintiff,	§	
	§	
v.	§	CASE NO: SA
	§	05-CA-0020-XR
CITY OF SAN	§	JULY 25, 2006
ANTONIO,	§	
NORMA WOODS	§	
BADGE # 0899;	§	
L. CARRION,	§	
BADGE # 0170;	§	
J. WILLINGHAM,	§	
BADGE # 0688;	§	
E. RODRIGUEZ,	§	
BADGE # 1567;	§	
Defendants.	§	

ORDER

*1 On this date, the Court considered Defendants' Motion for Summary Judgment (docket no. 59), Plaintiff's Response in Opposition (docket no. 61), and Defendants' Reply (docket no. 63).

After careful consideration, the Court will grant in

part and deny in part the motion.

Facts and Procedural Background

Plaintiff Roberta Martin filed this suit *pro se* complaining about the violation of her constitutional rights during a traffic stop and arrest on the night of January 15, 2003. The trial Court approved her application to proceed *in forma pauperis* and appointed an attorney to represent her. The record below shows that Plaintiff drove to visit a friend at someone's home, but after determining that her friend was not there, returned to her car and drove towards her home. A short time later, she saw flashing police lights and pulled over. Officer Rodriguez approached the driver's side window and asked plaintiff for her identification. Plaintiff did not have her driver's license, but gave officer Rodriguez a medical identification card and her proof of insurance. When plaintiff asked why she had been stopped, Officer Rodriguez stated that she was not wearing her seatbelt. Plaintiff protested that she was in fact wearing her seat belt. A second officer, Officer Carrion, approached her car at the passenger window and focused his flashlight inside the car.

Plaintiff, a female of African descent was then instructed to exit the vehicle, and she and the officers moved to an area at the rear of the vehicle. Plaintiff alleges that Officer Carrion then began searching her

car, and that the officers "found a crack pipe and a small amount of cocaine on the ground by the driver's side door.

Plaintiff was handcuffed and the officers ran a criminal background check. After learning of her criminal record for drug possession and prostitution, the officers began calling her derogatory names such as a crackhead and nigger, and also told her that someone was coming to search her pussy. Plaintiff was placed in the back of a patrol car. The officers repeatedly stated "Get Butch". A canine unit arrived, and a canine search of Plaintiff's vehicle revealed no drugs or evidence of criminal activity. Eventually, Officer Norma Woods arrived. Plaintiff testifies that Woods told Plaintiff to exit the vehicle or she would be forcibly removed. Woods put on a pair of blue gloves and moved plaintiff to an area near the back of the police car on the side of the road. Plaintiff alleges that Woods started checking her outer clothing, then pulled her pants down. Plaintiff testified that Woods then penetrated her vagina with her fingers for three to five minutes, and that when Plaintiff tried to turn around to see Wood's badge, Wood's told her to turn around and shut the fuck up, bitch. Woods then attempted to insert her finger in Plaintiff's anus, but Plaintiff went ballistic. Plaintiff testified that she protested that that was virgin territory, to which officer Willingham allegedly responded that she should be used to being fucked back there and that her asshole should be as

wide open as the outdoors. Woods completed the search without penetrating plaintiff's anus, and then placed Plaintiff back in the police car. Officers Rodriguez and Carrion took Plaintiff to the jail, and Plaintiff was booked for possession of cocaine. Plaintiff asserts that she began seeing psychiatrist in November 2003 due to her emotional injuries from the event.

> FNI At her deposition, Plaintiff first testified that she thought both Officer Carrion and Officer Willingham called her "nigger. Depo at 106. However, she also testified that she thought only one of them did, but she could not be sure which one. Depo at 110-11.

*2 Plaintiff's Complaint asserts a cause of action pursuant to 28 U.S.C. §1983 against Officers Rodriguez, Willingham, Woods, and Carrion for a violation of her Fourth Amendment rights based on the strip and body cavity search conducted in the field. The second cause of action is brought against the City pursuant to §1983 for a violation of Plaintiff's Fourth Amendment rights based on the field strip and body cavity search. The Complaint alleges that, although

the City has a facially neutral policy and custom regarding strip searches, the officers acted with deliberate indifference to Plaintiff's Fourth Amendment rights. The second cause of action further alleges that the City has an established custom and unwritten policy of conducting strip and body cavity searches of certain female arrestees in the field, and that this established custom and unwritten policy was the moving force behind the violation of Plaintiff's constitutional rights.

The third cause of action alleges a §1983 claim against the City for a violation of Plaintiff's Fourteenth Amendment Rights based on harassing and abusive verbal conduct toward her during the arrest. And the Fourth cause of action alleges a §1983 claim against individual officers for a violation of Plaintiff's Fourteenth Amendment rights based on their verbal harassment of her as well.

Defendants' Motion for Summary Judgment

Defendants' move for summary judgment on the bases that: (1) Plaintiff fails to establish any liability on the part of the City because she fails to produce any evidence of a policy or custom that was the moving force behind the alleged constitutional violation; (2) Plaintiff fails to establish a claim under the equal protection clause of the Fourteenth Amendment based on the officers' alleged abusive and harassing language

toward her because there is no deprivation of equal protection when the officers' conduct consists solely of speech; (3) the individual officers are entitled to qualified immunity because, at the time of the incident, the law was unclear whether a police officer having probable cause and individualized reasonable suspicion that the Plaintiff possessed contraband could perform a body cavity search at an arrest site under the circumstances with which theses officers were faced; (4) the individual officers are entitled to qualified immunity because, at the time of the incident, the law was not sufficiently clear that a reasonable officer would understand that the alleged language could violate a constitutional right; (5) the individual officers are entitled to qualified immunity because their actions were objectively reasonable; and (6) no cause of action exists under the Texas Constitution.

Analysis

A. Plaintiffs' claims against the City of San Antonio

> FN2. Plaintiff originally sued the San Antonio Police Department, but that is not a legal entity capable of being sued. *See Darby v. Pasadena Police Dep't, 939*

F.2d 311, 313 (5th Cir. 1991).

Defendant City of San Antonio argues that Plaintiff has failed to establish that the City had a custom or practice that was the moving force behind the violation of either her Fourth or Fourteenth Amendment rights. Accordingly, the City argues, it is entitled to summary judgment on all of Plaintiff's claims against it. Plaintiff fails to refute this argument on her response to the motion for summary judgment.

*3 With respect to the City, Plaintiff must demonstrate both that a municipal employee violated a clearly established constitutional right and that the violation was the result of a municipal policy or custom. *Olabisiomotosho v. City of Houston, 185 F.3d 521, 528-29 (5th Cir. 1999).* As noted by Defendant, Plaintiff admits that the City has written policy that prohibits strip and body cavity searches of arrestees by its officers in the field. The City's written policy states that, [b]efore transporting prisoners, officers are responsible for conducting a search, not to include a strip or body search, of prisoners to remove all weapons, dangerous objects, contraband, or evidence. Further, [o]fficers having reasonable suspicion to believe a prisoner possesses contraband, evidence, or a weapon within his/her body which, if not found, would constitute a danger to the safety of the officers or others, will request a complete strip search, not to include an inner-body or cavity search, of the prisoner

for those items by Detention Center personnel. And, [o]fficers having reasonable suspicion to believe a prisoner possesses contraband, evidence, or a weapon within his/her body which, if not found, would constitute a danger to the safety of the officers or others, shall transport the prisoner to a qualified medical facility and request a complete inner-body or cavity search of the prisoner for those items within the body by qualified medical personnel.

Despite the existence of this policy, Plaintiff alleges, the City has an established custom and unwritten policy of allowing officers to conduct body cavity searches of certain female arrestees in the field. However, plaintiff has not offered any evidence that this type of search was more than an isolated event. Isolated violations are not the persistent, often repeated, constant violations that constitute custom and policy. *Bennet v. City of Slidell, 728, 762, 768 n. 3 (5th Cir. 1984) (en banc) (citing Berry v. Mc Lemore, 670, F.2d 30, 32 (5th Cit. 1982) (holding that single, improper arrest is not the kind of systematic municipally supported abuse that constitutes custom*). In addition, she offers no evidence that any official policy makers were actually constructively aware of a custom by officers of ignoring the written policy and conducting strip and body-cavity searched in the field such that they were deliberately indifferent towards the constitutional rights of persons who came into contact with the police. Accordingly, Plaintiff fails to

create a fact issue to prevent summary judgment on her §1983 claims against the City.

FN3. At her deposition, Plaintiff stated only that

> "And this woman [Officer Woods] been doing this. She's been doing it and City know about it .... She did another girl that couldn't sit down .... Norma Woods need to stop. She's been doing this and getting away with it for the longest, and they know it." However, these conclusory allegations are insufficient to create a fact issue on whether this type of field search occurred on more than one or two occasions and whether the City knew it.

In addition, summary judgment is granted on Plaintiffs claims pursuant to the Texas Constitution because there is no private right of action for violations of the Texas Constitution. City of Beaumont v. Boullion, 896 S.W.2d 143 (Tex. 1995).

Accordingly, the Court finds that summary judgment should be granted on all of Plaintiffs claims against the City, and those claims are dismissed with prejudice.

B. Plaintiff's Claims Against the Individual Officers

1. Fourth Amendment claims

*4 In Count I, Plaintiff alleges that "the actions of Defendants Rodriguez, Carrion, Willingham and Woods, in conducting a body cavity search of Plaintiff MARTIN in the field, on a public street, in failing to heed and accommodate Plaintiff Martin's pleas/requests (while under arrest and handcuffed) to stop the body cavity search in the field and transport her to County jail for the search, if necessary, were in violation of Plaintiff Martin's Fourth Amendment right to a reasonable search that did not subject her to the egregious humiliation, degradation, and mental anguish she suffered as a result of their actions." 2d Am. Complaint ¶ 44. She further alleges that the officers intentionally, recklessly, and maliciously violated her right to a reasonable search by invading her right to privacy "through the conduct of the field body cavity search." *Id.* ¶ 45, 46. She sued the officers in their individual capacities and asserted that they are not entitled to qualified immunity.

Defendants move for summary judgment on this

count on the basis of qualified immunity. In *Harlow v. Fitzgerald*, the Supreme Court established that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). The Court subsequently clarified in *Siegert v. Gilley, 500 U.S. 226, 232-34 (1191)*, that courts evaluating §1983 claims based on allegedly unconstitutional conduct by state actors should conduct a two-prong inquiry to determine whether the state actors are entitled to qualified immunity. "[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged." *Saucier v. Katz, 533 U.S. 194.200 (2001).*"[I]f a violation could be made out on a favorable view of the parties' submissions, the next sequential step is to ask whether the right was clearly established" at the time of the state actor's conduct. *Id at 201* . Ultimately, a state actor is entitled to qualified immunity if his or her conduct was objectively reasonable in light of the legal rules that were clearly established at the time of his or her actions. *McClendon v. City of Columbia, 305 F.3d 3 14,323 (5th Cir.2002).*

Defendants contend that they are entitled to qualified immunity because, at the time of the incident, the law in the Fifth Circuit "was unclear with regard to whether a police officer having probable

cause and individualized reasonable suspicion that the Plaintiff possessed contraband, i.e., rock cocaine, could perform a body cavity search at an arrest site under the totality of circumstances with which these Defendants were faced. "On summary judgment, the court looks to the evidence before it in the light most favorable to the plaintiff when evaluating the issue of qualified immunity. *Id.* Accordingly, this Court's task is to examine the summary judgment record and determine whether Plaintiff has adduced sufficient evidence to raise a genuine issue of material fact suggesting (1) that the Officers' conduct violated an actual constitutional right; and (2) that the Officers' conduct was objectively unreasonable in light of law that was clearly established at the time of their actions.

*5 As the Supreme Court explained in *Hope v. Pelzer, 536 U.S. 730 (2002)*, "qualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Id* at 73 9. Thus, the salient question under the second prong of the test is "whether the state of the law at the time of the state action gave [the state actors] fair warning that their alleged treatment of the plaintiff was unconstitutional." *Id* at 740. If there is no Fifth Circuit of Supreme Court authority on point, the Court considers whether there was a consensus of persuasive authority such that a reasonable officer

could not have believed that his actions were justified. *McClendon, 305 F.3d at 329 (citing Wilson v. Layne, 526 U.S. 603, 617 (1999).* In determining what the relevant law is, the Court must necessarily exercise some discretion in determining the relevance of particular law under the facts and circumstances of each case, looking at such factors as the overall weight of authority, the status of the courts that rendered substantively relevant decisions, and the jurisdictions of the courts. *McClendon, 305 F.3d at 323.* Further, the Supreme Court has recognized that the "clearly established" standard depends substantially on the level of generality at which the relevant legal rule is defined. *Id* at 330-3l.The factual situation from which the pre-existing constitutional right developed does not have to be "fundamentally similar" to the one before a court when addressing qualified immunity. *Williams v. Kaufman County, 352 F .3d 994. 1003 (5th Cir.2003).* Rather, qualified immunity can be overcome as long as "prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* Officials can still be on notice that their conduct violates established law even in novel factual circumstances. *Id.*

In *Bell v. Wolfish*, which involved body cavity searches of pretrial detainees, the Supreme Court noted that the Fourth Amendment prohibits only unreasonable searches, but that the test of reasonableness is not capable of precise definition or

mechanical application. *441 U.S. 520, 558-59 (1979).* In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. *Id.* Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. Id. at 559; see also *Moore v. Carwell, 168 F.3d 234, 237 (5th Cir.1999)* (listing these factors to determine reasonableness of search).

Here, Plaintiffs evidence suggests that the scope of the particular intrusion is severe. Plaintiffs pants and underwear were pulled down in public view of male officers and passing vehicles, and Officer Woods "fondled" her, penetrated her vagina for "three to five minutes," and attempted to penetrate her rectum. Strip searches and body cavity searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signifying degradation and submission." *Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir.1983); see also Way v. County of Ventura, 445 F.3d 1157, 1160 (9th Cir.2006)* (describing a visual body cavity inspection that did not involve touching as indisputably a "frightening and humiliating" invasion the intrusiveness of which "cannot be overstated). The highly intrusive search was conducted on a public street rather than at a medical facility or, at a minimum, in a private room. *Logan v. Shealy, 660*

F.2d 1007, 1014 (4th Cir. 1981) ("One of the critical, and certainly most obvious, elements in the *Bell v. Wolfish* balancing inquiry into the reasonableness of the strip search is 'the place in which it is conducted"). Officers had taunted Plaintiff about the impending search and used abusive language toward her, and Plaintiff testified that Woods used abusive language toward her during the strip and body cavity search. Even if the officers reasonably suspected that Plaintiff was concealing contraband in a body cavity, there were no exigent circumstances requiring the search to be conducted on the public roadside rather than at a medical facility in compliance with SAPD procedures. Under these circumstances, the Court finds that the alleged manner of the search would have violated Plaintiffs Fourth Amendment rights and that no reasonable officer would have believed the manner of the search to be reasonable.

> FN4. In Wi1liams v. Kaufman County. 352 F.3d 994, 1012 (5th Cir.2003), decided on December 9, 2003, and thus after these events, the Fifth Circuit stated that "If, perhaps, defendants were within their constitutional authority to strip search plaintiffs to begin with, but

> impermissibly conducted the strip search in a public area, then plaintiffs may have had a privacy-oriented Fourth Amendment claim."

*6 The Court also finds that the law was sufficiently clear by January 15, 2003 that no reasonable officer would have believed the manner of the search to be reasonable at that time. The Supreme Court's decision in *Bell v. Wolfish* and Fifth Circuit precedent had clearly established by January 15, 2003 that searches cannot be conducted in an abusive fashion, and they must be conducted in a reasonable manner. The Fifth Circuit has noted that few searches are more intrusive than a body cavity search, *U.S. v. Caldwell.* 750 F.2d 341, 343 n. 2 (5th Cir.1984), and "[t]he more intrusive the search, the heavier is the government's burden of proving its reasonableness." *United States v. York, 578 F.2d 1036, 104 (5th Cir.1978).* Thus, it was well settled by January 15, 2003, that strip searches and body cavity searches raise serious Fourth Amendment concerns. *Roe v. Dep't of Protective & Regulatory Servs ., 299 F.3d 395. 409 (5th Cir.2002)* (noting that this was established by 1999).

Though recognizing the Fourth Amendment implications of strip and body cavity searches, the Fifth Circuit does not appear to have considered the

reasonableness of a body cavity search conducted in public in the manner confronted here. Nevertheless, the defendant officers would still have been put on notice by existing Fifth Circuit and Supreme Court precedent as well as a consensus of persuasive authority from other courts that the search, if conducted in the manner alleged by Plaintiff, would violate Plaintiffs Fourth Amendment rights. In *Moore v. Carwell*, the Fifth Circuit held that a strip search of a male prisoner by a female officer in the absence of emergency circumstances constitutes a claim that "could entitle [plaintiff] to relief for a Fourth Amendment violation. "The Court noted that one must consider the manner in which a search is conducted in determining whether the search is reasonable. Thus, it was established in this Circuit in 1999 that, regardless of whether the search is justified, it may be a violation of the Fourth Amendment if it is conducted in an unreasonable manner. *See* also *Tennessee v. Garner. 471 U.S. I. 7-8 (1985)* (reasonableness depends not only on when a search or seizure is made, but also how it is carried out). Further, in 2002, the Fifth Circuit noted that it and other courts of appeals had recognized that prisoners have a right to bodily privacy that provides limitations on the manner in which searches maybe carried out. *Oliver v. Scott, 276 F.3d 736,745 & n. 13 (5th Cir.2002) (citing Haves v. Marriott, 70 F.3d 1144, 1147-48 (10th Cir.1996)* (holding that body cavity search of male prisoner in front off the male guards stated a claim for Fourth

Amendment violation absent showing of security need). Though acknowledging that visual body cavity searches are reasonable under appropriate circumstances, the Fifth Circuit in 2002 in *Johnson v. Scott, 31 Fed. Appx. 836 (5th Cir.2002)*, held that a prisoner's complaint that body cavity searches were performed every time the prisoner had non-contact visits and that the searches were conducted in an insensitive and humiliating manner, outside in view of male officers working in the area and delivery persons making deliveries to the prison, stated a claim that officials acted with deliberate indifference to the unreasonable searches or implemented or condoned a custom or policy of unreasonable body cavity searches.

*7 In 1994, the Fifth Circuit considered a §1983 claim by a prisoner who was subjected to a visual body cavity search in the general presence of other inmates, guards, and non searching officers for a violation of his Fourth Amendment rights. *Elliott v. Lynn. 38 F.3d 188 (5th Cir. J 994)*. The Court held that the group, institution-wide visual cavity search conducted in view of others did not violate the Fourth Amendment, but because there were exigent circumstances. And, when strip and body cavity searches have been upheld without such "exigent circumstances," the Court has pointed out that the government conducted the search in a private and reasonable manner. *See*, e.g., *United States v. Lilly, 576 F.2d 1240 (5th Cir.1978)* (noting that body cavity search of female was conducted by a

female medical officer in the prison clinic in the presence of only the medical officer and a female correctional officer).

In addition, sufficient precedent existed in other jurisdictions at the time of the event for the officers to have reasonable notice that their conduct would violate the Fourth Amendment. *See Kraushaar v. Flanigan, 45 F.3d 1040, 1054 n. 7 (7th Cir.1995)* (noting that "there are several cases which suggest that qualified immunity would not exist for a strip search conducted in public view"); *see also*, e.g., *Amaechi v. West. 237 F.3d 356, 364 (4th Cir.200l)* (denying qualified immunity to male officer who physically searched the genitalia of half-naked female arrestee with bare hand on public street); *Isbv v. Duckworth, 175 F.3d 1020 (7th Cir.1999)* (unpublished) ("Although the prison officials' decision to conduct the rectal cavity search was reasonable, we must also consider whether Isbv was searched in a reasonable manner. To make this determination, courts consider issues such as privacy, hygiene, the training of those conducting the searches, and whether the search was conducted in a professional manner."); *Rodriguez v. Furtado, 950 F.2d 805,811 (lst Cir.1991)* ("At least where there are no exigent circumstances present, the severity of the personal intrusion manifested by these [vaginal] searches would indicate that they be conducted by a doctor in a private and hygienic setting and in a medically approved

manner."); *Iskander v. Village of Forest Park. 690 F.2d 126, 129 (7th Cir.1982)*("Bell recognizes that even in cases where routine strip searches are justified by legitimate security concerns, they nevertheless must be conducted in a reasonable manner. Defendant naturally does not maintain that routine strip searches may be conducted in a room open to the prying eyes of passing strangers consistent with the reasonableness requirement imposed on all searches under the Fourth Amendment, nor would such a contention be entertained."); *Logan v. Shealy, 660 F.2d 1007, 1014 (4th Cir.1981)* ("We think that, as a matter of law, no police officer in this day and time could reasonably believe that conducting a strip search in an area exposed to the general view of persons known to be in the vicinity, whether or not any actually viewed the search, is a constitutionally valid governmental 'invasion of (the) personal rights that (such a) search entails. '"); *U.S. v. Cameron. 538 F.2d 254, 258 (9th Cir.1976)* (noting that "any body search, if it is to comport with the reasonableness standard of the fourth amendment, must be conducted with regard for the subject's privacy and be designed to minimize emotional and physical trauma" and thus a reasonable search will include "reasonable steps to mitigate the anxiety, discomfort, and humiliation that the suspect may suffer").*Cf. Evans v. Stephens. 407 F.3d 1272 (11th Cir.2005)* (holding that no preexisting case law on point was needed to establish that the search was unreasonable, as the Fourth Amendment itself

requires reasonableness and the violation was obvious).

*8 Though the parties dispute whether the search occurred in the manner alleged by Plaintiff, Plaintiff has produced sufficient summary judgment evidence to raise a fact issue on that claim. Viewing the evidence in the light most favorable to Plaintiff, the Court finds that the individual officers' motion for summary judgment based on qualified immunity should be denied. Accordingly, the motion for summary judgment on Plaintiffs claims against the individual officers based on a violation of the Fourth Amendment is denied.

2. Fourteenth Amendment violations

Plaintiff asserts §1983 claims against the individual officers for violation of her Fourteenth Amendment rights based on their abusive and harassing language towards her during the arrest. Specifically, Count IV alleges that the police officers called her derogatory names and also used racial epithets (specifically, "nigger"), and that this conduct violated her right to equal protection under the Fourteenth Amendment.

Defendants move for summary judgment on this claim, arguing that the contours of the law in the Fifth Circuit were not sufficiently clear on January 15, 2003

that a reasonable officer would understand that the language allegedly used during Plaintiffs arrest could violate a constitutional right. Defendants also argue that Plaintiffs equal protection claim must fail because she has not alleged nor made any showing that similarly situated non-minorities were treated differently. Last, Defendants argue that summary judgment must be granted in favor of Officer Rodriguez because Plaintiff admitted in her deposition that Rodriguez did not verbally abuse or harass her.

In *Williams v. Bramer. 180 F.3d 699 (5th Cir.1999)*, the Court considered whether an officer's use of a racial epithet, standing alone, violated a detainee's equal protection rights. The Court held that the evidence that the officer used a racial epithet was insufficient to make out an equal protection violation because the alleged use of the epithet did not amount to conduct, such as harassment that would deny the plaintiff of equal protection of the laws. *Id.* at 705. The Court stated that "an officer's use of a racial epithet, without harassment or some other conduct that deprives the victim of established rights, does not amount to an equal protection violation." *Id.* at 706. The Court discussed its prior decision in *Johnson v. Morel, 876 F.2d 477, 478 (5th Cir.1989)*, which involved allegations that an officer used his vehicle to push the plaintiffs broken down car over a bridge while transmitting racial slurs and epithets over his vehicle's loud speaker. The Court noted that other

circuits have interpreted that decision to stand for the principle that racial epithets coupled with harassment are sufficient to support a cause of action under the Equal Protection Clause. *Williams, 180 F.3d at 706.* In 2003, in *Williams v. Kaufman County, 352 F.3d 994, 1013 & n. 60 (5th Cir.2003),* the Court referred to *Bramer* and noted that it had "impliedly held that racial epithets that accompany harassment or a violation of established rights may amount to a separate equal protection violation."(Emphasis omitted.)

*9 The Court concludes that the defendant officers, pursuant to Morel and other cases, would have been put on notice that the use of racial epithets coupled with harassment (the body cavity search) are sufficient to support a cause of action under the Equal Protection Clause. Though the parties deny the use of racial epithets in the manner alleged by Plaintiff, Plaintiff has produced sufficient summary judgment evidence to raise a fact issue on that claim. Viewing the evidence in the light most favorable to Plaintiff, the Court finds that the individual officers' motion for summary judgment based on qualified immunity should be denied. Accordingly, the motion for summary judgment on Plaintiffs claims against the individual officers based on a violation of the Fourteenth Amendment is denied.

However, summary judgment on this

Fourteenth Amendment claim is granted in favor of Officer Rodriguez because Plaintiff admits in her deposition that Rodriguez did not verbally abuse or harass her.

Conclusion

Defendants' Motion for Summary Judgment (docket no. 59) is granted in part and denied in part. Summary judgment is GRANTED in favor of the City of San Antonio on all of Plaintiffs claims against it. The individual officers' motion for summary judgment on Plaintiffs Fourth Amendment claims is DENIED. The individual officers' motion for summary judgment on Plaintiffs Fourteenth Amendment claims is DENIED, however, summary judgment on this Fourteenth Amendment claim is granted in favor of Officer Rodriguez.

/s/
Judge Xavier Rodriguez
United States District Judge

FILED
MAY 31, 2007 *pf*
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY_____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERTA L. MARTIN,	§	
Plaintiff,	§	
	§	
v.	§	CASE NO: SA-05-
	§	CA-0020-XR
CITY OF SAN	§	JULY 25, 2006
ANTONIO,	§	
NORMA WOODS	§	
BADGE # 0899;	§	
L. CARRION,	§	
BADGE # 0170;	§	
J. WILLINGHAM,	§	
BADGE # 0688;	§	
E. RODRIGUEZ,	§	
BADGE # 1567;	§	
Defendants.	§	

FINAL JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Xavier Rodriguez, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the Plaintiff Roberta Lynn Martin take nothing, that the action be dismissed on the merits, and that the Defendants recover of the Plaintiff Roberta Lynn Martin their costs of action. A bill of costs must be filed in the form required by the Clerk of this Court, with supporting documentation, within fourteen days of this Judgment.

SIGNED this 31st day of May, 2007.

/s/ Xavier Rodriguez
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
Fifth Circuit
FILED
March 3, 2009
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-50779

SUMMARY CALENDER

ROBERTA LYNN MARTIN

Plaintiff-Appellant

v.

SAN ANTONIO POLICE DEPARTMENT;
NORMA WOODS, Badge #8099;
LEROY CARRION, Badge #0170;
JIM WILLINGHAM, Badge #0688;
EDUARDO RODRIGUEZ, SR., Badge #1567;
CITY OF SAN ANTONIO

Defendant-Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:05-CV-20

Before DAVIS, GARZA and PRADO, Circuit Judges.
PER CURIAM:

After a jury trial and a verdict in favor of the defendants, judgment was entered dismissing the civil rights complaint of Roberta Lynn Martin. The district court denied Martin's motion to proceed *in forma pauperis* (IFP) on appeal, finding that her appeal was not taken in good faith under 28 U.S.C. §1915(a)(3). The district court also denied Martin's motion for transcripts at government expense. Martin has filed three motions with this court: to proceed IFP on appeal, for transcripts at government expense, and for appointment of appellate counsel. In her IFP motion, Martin argues that (1) the defendants perjured themselves during the trial, (2) the City of San Antonio was not entitled to summary judgment, (3) the defendants' internal affairs files should have been admitted as evidence, and (4) the district court clearly erred in overruling her challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986).

Under 28 U.S.C. Sec. 1915 (a), a federal court may refuse to certify an appeal for in forma pauperis status if it is not taken in good faith. *Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983). Martin's IFP

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* Pursuant to 5th Cit. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R.

motion is contrued as a challenge of the certification decision. See Baugh v. Taylor, 117 F.3d 197, 202 (5th Cir. 1997). The court's inquiry into whether the appeal is taken in good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous). Id at 220 (quotation marks omitted). Martin has failed to show that the district court erred in concluding that her appeal was not taken in good faith.

The motion for leave to proceed IFP on appeal is denied. Because Martin's appeal is without arguable merit, See Howard, 707 F.2d at 219029 (5th Cir. 1983), it is dismissed as frivolous. See 5th Cir. R. 42.2. Martin's motions for transcripts at government expense and for appointment of appellate counsel are likewise denied.

IFP DENIED: APPOINTMENT OF COUNSEL DENIED; TRANSCRIPTS AT GOVERNMENT EXPENSE DENIED; APPEAL DISMISSED.

United States Court of Appeals
Fifth Circuit
FILED
March 3, 2009
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-50779

SUMMARY CALENDER

D.C. Docket No. 5:05-CV-20-XR

FILED
MARCH 30, 2009
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____/s/_____
DEPUTY CLERK

ROBERTA LYNN MARTIN
Plaintiff-Appellant

v.

SAN ANTONIO POLICE DEPARTMENT;
NORMA WOODS, Badge #8099;
LEROY CARRION, Badge #0170;
JIM WILLINGHAM, Badge #0688;

EDUARDO RODRIGUEZ, SR., Badge #1567;
CITY OF SAN ANTONIO

Defendant-Appellees

Appeal from the United States District Court for the Western District of Texas at San Antonio

JUDGMENT

This cause was considered on the record on appeal and the briefs on file. It is ordered and adjudged that the appeal is dismissed as frivolous.

IT IS FURTHER ORDERED that plaintiff-appellant pay to the defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: 25 MAR 2009

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit
By: /s/ Rhonda F. Parker
Deputy

New Orleans, Lousiana
25 MAR 2009